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No. 1031

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1965

NED C. BAKES,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

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SUMMARY OF THE MATTER INVOLVED.

To the Honorable Chief Justice and Associate Justices of the United States:

The Petitioner was found guilty by a jury of willful failure to file income tax returns for the years 1957 and 1959, and after a denial of motions for new trial and in arrest of judgment, the court sentenced petitioner to serve one year and also assessed a fine of $2500 on Count I of

the Information. The same sentence and the same fine was imposed on Count II of the Information. The sentences were ordered to be served consecutively.

FACTS

The record discloses that an Information in Two Counts was filed against petitioner. Count I charged petitioner with willful failure to file a return for the year 1957 although receiving a gross income of $30,248.20 for the calendar year 1957. Count II again charged a willful failure to file a return for the year 1959, although receiving a gross income of $43,844.80 for the calendar year 1959.

One, Margaret Gaines testified for the Government that in April, 1963, she was a clerk for the Internal Revenue Service. That she had access to all income tax returns filed in the office of the District Director in Chicago. That she also had an occasion to examine records of the District Director's Office, and to determine whether an income tax return for the year 1959 was filed for Mr. Bakes. (App. 15) On cross examination she testified that there were about 40 people employed in the unit. That she, the supervisor and Mr. Pawley searched, but they found nothing. They found no W-2 forms. (App. 15) That they did not check for 1957. That she found nothing for 1959. (App. 16)

Lawrence Pawley, testified for the Government that he is a Special Agent of the Internal Revenue Department; that his office is at 22 West Madison Street; that as such special agent, he had access to income tax returns. That he and a Mr. Griffin examined the records to determine if Ned C. Bakes filed for the year 1957. That he and Margaret Gaines examined the records to determine if

Mr. Bakes filed for 1959; that she found no record of a return having been filed for either 1957 or 1959. (App. 16)

One Mathew Szwed, testified for the Government that he is an assistant chief of returns and receipts branch; that since 1950, he was responsible for the processing (App. 17) of income tax returns filed in the Chicago office. That all returns filed in the Northern 26 counties of Illinois are processed at 22 West Madison Street. That the returns are received from the post office in mail carts. That they extract the envelopes from sacks, slit the edges and handle them in groups of 100. (App. 17) The bundles are exported to mail extractors who extract the contents and attach all envelopes, documents and pin the remittances. They are sorted out into returns with checks and returns without checks. Those with checks are given to the cashier for deposit and numbering of the returns. Those without remittances are forwarded to the examiners. (App. 17) For completeness and verified tax computation they are then sent back to the examiners and to the numbering clerk. They are numbered in groups of 100. That they then are transported to the listing department where an index card is prepared. Then a ledger card is made and sent for filing to the journal section. (App. 18)

On cross examination he testified that NO RETURNS ARE MISLAID IN THE OFFICE, that if they don't arrive they don't receive them. THAT IN 19 YEARS, TO HIS KNOWLEDGE, NO RETURNS HAD EVER BEEN LOST. They they process 2 MILLION 8 HUNDRED THOUSAND TAX RETURNS A YEAR. That the processing is done manually. (App. 18) When the returns arrive, they either stay at 22 West Madison Street or are forwarded to Kansas City. If a taxpayer mails a return and doesn't include payment, a return stays in the office. (App. 19) That the only thing that goes out

for collection is the collection notice. Returns that have been filed timely do not bear a stamp. On redirect examination, he testified that the only scrap paper that they have in the office are the envelopes that the returns are mailed in. That he candled each envelope to see if there were any contents left in them. That all of the exhibits (1 to 5) are numbered in our office. (App. 20)

Rose Chowaneck, testified that she is supervisor in the Certification Group of the Credit Unit, Accounts Maintenance Section, Internal Revenue Service. (App. 20) That she was asked by the United States Attorney to prepare an 899 form which is a certificate of assessment and payment; that Government's Exhibit No. 6 is the form 899 which she prepared. That all of the records available for assessments and refunds are consulted in preparing the form. That it was prepared in the ordinary and regular course of business. That she consulted all of the records under the names of Ned and Rose Bakes which include an account ledger card, cashier's book and index cards. (App. 21) That it shows no return was filed in 1957 nor in 1959. It shows returns were filed for 1955, 1956, and 1958 and 1960 and 1961. It also showed the amounts paid in each of those years. It does not show any withholding tax for year 1957. That it would be on another account. IT INDICATED THAT A COMPLETE SEARCH OF ALL TAXES HAD NOT BEEN MADE ON THE REQUEST FOR INDIVIDUAL INCOME TAX RETURNS. IT REFLECTS A PAYMENT OF $938.60 FOR THE YEAR 1959 BUT DOES NOT REFLECT ANY WITHHOLDING TAX OF $938.60 FOR THE YEAR 1959. (App. 22) A 1040 tax return includes withholding tax, but does not reflect taxes paid by the taxpayer or his employer in the form of withholding tax. An investiga-

tion was made to locate tax returns for the years 1957 and 1959 but we could not locate either. NO SEARCH WAS MADE FOR ANY W-2 FORMS. (App. 22)

Withholding tax paid by an employee is not reflected in form 899. (App. 23) However, form 899 does not reflect all the taxes that a taxpayer has paid.

One Lillian Mundle testified for the Government that she was employed by the M. R. Roberts Company from 1951 through 1960; that she was familiar with the books and records of the M. R. Roberts Company when she was employed there. That Ned Bakes was on the payroll in 1957 and through 1960. She identified Government's Exhibit No. 12 as a series of 43 checks containing Roberts' and her signature which were paid to the Internal Revenue Service on behalf of Ned Bakes. ON CROSS EXAMINATION SHE TESTIFIED THAT M. R. ROBERTS SENT IN W-2 FORMS EACH YEAR; THAT SHE SENT W-2 FORMS FOR THE YEARS 1957, 1958 AND 1959.

Albert C. Geist, testified that he is a bookkeeper for Krug Excavating Co. (App. 57) since 1948; I know Ned Bakes and brought records showing compensation from the company to Ned Bakes. THE KRUG EXCAVATING COMPANY MADE OUT FORM 1099 AND SENT IT TO THE GOVERNMENT IN 1957 AND 1959. FOR 1957 IT WAS $4800; FOR 1959, IT WAS $11,000.

Rose Bakes, testified that she was the wife of petitioner; that in April of 1960, petitioner called her from California and asked her to sign and mail the 1959 tax return; that she did sign and mail the 1959 return; that she signed and mailed the return sometime before April 15, 1960. That she remembers it distinctly because two days later she left for California.

That petitioner told her to mail the income tax return; he left it in the top drawer of his dresser; he had signed it but there was a self addressed envelope; it contained a return address; it was addressed to the Internal Revenue; there was a stamp on it ready to mail (App. 69); she mailed it before she went to the airport. She mailed it in front of the building at 900 Lake Shore Drive; she saw it go into the slot of the post office box; she does not recall the date of her return from California; it was in July, 1960; she does not recall the specific date. (App. 69)

Ned Bakes, petitioner, testified respecting the 1957 and 1959 returns as follows:

He made out a 1957 income tax return. Defendant's Ex. No. 16 for identification is the 1957 return that he filed; and Defendant's Group Exhibit 16 was again identified; part of (App. 72) Defendant's Exhibit 16 is a W-2 form received from M. R. Roberts Company. It is for withholding tax, Social Security and amount of total wages was $6,968.00; another part of Defendant's Exhibit 16 is a 1099 form from Krug Excavating Co. (App. 72); the third one is a 1099 form from M. R. Roberts Company for $3,000.00; the rest of the documents have attached a photostat received from the Internal Revenue showing an extension of time to file the 1957 return to August 15, 1958. He made up the original document of Defendant's Group Exhibit 16; I put my signature on it; it was before the August date of final extension; my wife also signed it and mailed it. (Defendant's Group Exhibit was admitted into evidence without objection; the defendant had Exhibit 25 marked for identification). I have seen Defendant's Exhibit 25 for identification. It is a 1959 tax return and has a W-2 form attached from M. R. Roberts and a 1099 form attached. I made up this return myself; some is typed and some is written by me; it is a copy of the

return that was mailed in. It is a copy of the return that my wife mailed. I did not request or get an extension of time for 1959; I had the 1959 return at home; I went to California; I thought I was coming back before the 15th of April (App. 73). I did not get back so I called my wife on or about the 11th or 12th of April and told her to sign the return; that everything was addressed and filled out; just sign it and mail it.

An appeal from the verdict of guilty and judgment of conviction was taken. On December 21, 1965, the Circuit Court of Appeals affirmed the conviction. Petitioner filed a petition for rehearing which was denied on January 28, 1966. The mandate was stayed until March 5, 1966.

The opinion of the Circuit Court of Appeals is published herein in full at pages 1 through 4, Appendix.

QUESTIONS PRESENTED

Should a conviction be sustained for a willful failure to file income tax returns upon the evidence submitted by the Government in this case.

STATUTES INVOLVED

26 U. S. C. A. 7203

WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the times or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. August 16, 1954.

JURISDICTION

The date of the judgment to be reviewed is December 21, 1965 Appellant's petition for rehearing was denied January 28, 1966. Jurisdiction to issue the Writ is under the provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. (28 U.S.C.A., Sec. 1254) Based on Title 28, U.S.C. 1940 Ed. Sec. 346 and 347 (March 3, 1911, C. 231, Sec. 239, 240, 36 Stat. 1157; Feb. 13, 1925, C. 229, Sec. 1, 43, Stat. 939; Jan. 1 1928, C. 14, Sec. 1, 45, Stat. 54; June 7, 1934, C. 426, 48 Stat. 926) (From Revisors Note, Title 28 U.S.C.A. Judiciary and Judicial Procedure, Sec. 1254, P. 42)

REASONS FOR ALLOWANCE OF WRIT

1. It was not proved that petitioner knowingly and wilfully failed to file income tax returns for the years 1957 and 1959.

2. The Government's evidence fails to establish that quantum of proof necessary to prove petitioner guilty of willful failure to file income tax returns for the years 1957 and 1959.

3. The Government has failed to sustain its burden of proving petitioner guilty beyond a reasonable doubt of a willful failure to file income tax returns.

ARGUMENT

The Government has the burden of proving the essential elements of the crime—that the defendant willfully and knowingly failed to file his 1957 and 1959 income tax returns. The proof introduced by the Government clearly fails to support that proposition.

The crime here charged is by statute a misdemeanor. (U.S. Code Annot., Title 26, Section 7203).

The prosecution of petitioner was by Information (App. 6).

The gist of the offense charged in the Information is willful failure on the part of petitioner to file a return for each of the years 1957 and 1959.

To establish this charge, the Government must prove:

(1) That the defendant was a person required by law to make a return for the years 1957 and 1959;

(2) That he failed to file a return for those years at the time required by law or any extension granted;

(3) That the failure to file such returns was willful. (*U. S.* v. *McCormick,* 67 F.2d 867).

The word "willful" as used in the Statute means with a bad purpose, or without ground for believing one's act is lawful, or with a careless disregard whether one has the right to ignore the provisions of the law. (*U.S.* v. *Murdock,* 290 U.S. 389)

The sum total of the Government's testimony was to the effect that several Internal Revenue employees made a search of the tax records in the office of the Director of

Internal Revenue in Chicago and that such search failed to disclose any return having been filed by petitioner for the years 1957 and 1959. The testimony for the Government showed that a search of the records failed to disclose any W-2 Forms having been filed or any form 1099 having been filed. (See Pages 2-6 of Petition for Writ.)

However, Lillian Mundle, who testified for the Government, testified that on behalf of the M. R. Roberts Company, she sent in W-2 forms each year; that she sent W-2 forms for years 1957 and 1959.

Albert C. Geist testified that he worked for Krug Excavating Company; that he made out form 1099 and sent it in to the Government in the years 1957 and 1959. Is it possible that both these witnesses, Mundle and Geist deliberately lied upon oath?

Can there be any doubt that these forms were received in the office of the Director of Internal Revenue as testified to by these witnesses? There can be no doubt that these forms, as testified to by these witnesses, were prepared and sent to the office of the Director of Internal Revenue and were, in fact, received in that office. The Government witnesses who testified said that they could not find the W-2 forms and form 1099, and the only conclusion that can be drawn from this testimony is that they were either lost or mislaid in the office of the Director of Internal Revenue. Might it not be possible that the 1957 and 1959 returns were also lost or mislaid since Government witnesses also testified that they could not find those returns. Petitioner and his wife, Rose Bakes, both testified; Mrs. Bakes testified positively that she mailed the

1959 tax return in an envelope addressed to the Director of Internal Revenue for the Chicago office; that she placed the same in a mail box at or near her residence.

Ned Bakes, petitioner herein, testified that he prepared and placed the 1957 tax return in an envelope addressed to the Director of Internal Revenue for the Chicago office and mailed the same to the office in Chicago.

This testimony is uncontradicted in the record!

We have no positive testimony by any Government witness that the petitioner failed to file his returns for the years 1957 and 1959. All we have in the record is that certain of the Government witnesses employed by the Internal Revenue Department made a search of their records and from such search were unable to find returns for those years which were filed by petitioner. Neither were they able to find the W-2 forms or the 1099 form testified to by the witnesses Mundle and Geist that they filled out and mailed to the Director of Internal Revenue. Isn't it significant that in receiving over 2 million 8 hundred thousand returns a year that the Director's office in Chicago has never mislaid or lost a return filed with it? Is it not more probable that with the receipt of such great amount of returns filed each year that from time to time returns might be mislaid or lost?

The Government in its Brief filed in the Court of Appeals sets forth the proposition of law that when the evidence is viewed in a light most favorable to the Government, it clearly supports the conviction of petitioner. We disagree with this and maintain that when the evidence in this case is viewed impartially that the Government has failed in its burden to prove petitioner guilty of a willful failure to file the returns in question beyond

a reasonable doubt. The Appeals Court on page 3 of its Opinion says:

> "A careful review of the record, in the light of foregoing, convincingly shows that the District Court did not err in allowing the Jury to determine whether Bakes wilfully and knowingly failed to file income tax returns for the years 1957 and 1959. The Jury's verdict is supported by substantial evidence."

We most respectfully submit a reading of the evidence in this case does not support a charge of willful failure to file income tax returns under the Statute in question.

When the Appeals Court sustained the conviction in this case, it was tantamount to saying that every defendant charged with crime must prove his innocence; it shifted the burden on him and departed from long established rules of law, which requires a governmental agency to prove a defendant charged with crime guilty beyond a reasonable doubt. If a conviction for willful failure to file income tax returns can be sustained under the evidence submitted in this case, than no man is safe from prosecution and conviction. Under the opinion of the Court of Appeals in this case, all the Government would have to do (as they have done in this case) is to submit evidence that a search was made; that no returns were found; hence, a defendant charged with failure to file, is guilty and should go to the penitentiary. This, despite the fact, that the Statute sets out that the failure to file must be done knowingly and willfully. Merely because certain returns cannot be found makes it enough for a defendant to be convicted and sentenced. Petitioner believes that the Government should submit much stronger evidence than the failure of the Government agents to find returns before a defendant should be sentenced to the penitentiary.

It is significant: (1) that more than five years elapsed before the Revenue Department notified petitioner that his 1957 tax return could not be found; that more than three years elapsed before he was notified that his 1959 tax return could not be found; (2) that agent Pawley wrote petitioner in the year 1963 and never mentioned to petitioner that the 1957 and 1959 tax returns could not be found; the only mention in the correspondence from Agent Pawley to petitioner was that petitioner's income tax returns from 1957 through 1962 were under investigation; (3) that his corporate employer submitted W-2 forms with remittances attached for the year 1957 and 1959; that these remittances were sufficient to alert the Revenue Service at the time they were filed, that petitioner's returns were missing, if in fact they were missing.

In February 1963, Mr. Pawley left a card in defendant's mail box in his apartment building asking for an interview; but he did not inform Mr. Bakes that his 1957 and 1959 income tax returns were not on file.

Further, Mr. Pawley's letter dated September 23, 1963, via registered mail, to Mr. Bakes, makes no mention whatsoever of missing income tax returns for 1957 and 1959. His letter reads as follows:

Ned C. Bakes
900 Lake Shore Drive
Chicago, Illinois
Dear Sir:

On February 26, 1963 and again on June 12, 1963 I left a card in your mail box at the above address. I received telephone responses to each of these cards but to date you have not made a personal appearance in response to my oral request to talk to you.

Your income tax liabilities for the years 1957 through 1962 are under investigation by this office. Before further action is taken, you are being afforded an opportunity for a personal interview and for the production of any records you wish to present regarding your tax liabilities for the years involved.

Accordingly, October 7, 1963 at 9:30 A.M. in Room 1331, 22 West Madison Street, Chicago, Illinois is set aside for this purpose.

If the time or date is not to your convenience, telephone Special Agent Lawrence W. Pawley, (222-6967) and arrangements will be made.

Yours truly,

Lawrence W. Pawley (signed)
Lawrence W. Pawley
Special Agent.

This letter indicates that income tax liabilities for the years 1957 through 1962 are under investigation (App. 41).

On October 14, 1963, Mr. Pawley wrote again as follows:

P. O. Box 1144
October 14, 1963

Certified Mail
Return Receipt Requested
Ned C. Bakes
900 Lake Shore Drive
Chicago, Illinois
Dear Sir:

On February 26, 1963 and again on June 12, 1963, I left a card in your mail box at the above address. I received telephone response to each of these cards but to date you have not made a personal appearance in response to my oral requests to talk to you.

On September 23, 1963, I sent you a letter by certified mail in which I informed you that your income tax liabilities for the years 1957 through 1962 are under investigation by this office. In this letter I set a date

for a conference on October 7, 1963. On October 9, I received a letter dated October 1, 1963 from Walter H. Maloney in which he stated you had consulted him regarding your tax matters, but at the time he wrote his letter, he stated he had not received from you a power of attorney authorization.

Before further action is taken, you are again being afforded an opportunity for a personal interview and for the production of any records you wish to present regarding your tax liabilities for the years involved. If you wish to afford yourself of this opportunity you may, if you desire, have any attorney of your choice present with you at the conference. It is not necessary that at the time of the conference he have a power of attorney authorization from you on file with the Internal Revenue Service.

Accordingly, October 21, 1963 at 9:30 A.M. in Room 1331, 22 West Madison Street, Chicago, Illinois is set aside for a conference with you.

If the time or date is not to your convenience, telephone Special Agent Lawrence W. Pawley (222-6967) and other arrangements will be made.

Yours truly,

Lawrence W. Pawley (signed)
Lawrence W. Pawley,
Special Agent

Both letters indicate that officially defendant was under investigation for income tax liability for the years 1957 to 1962. Defendant then consulted an attorney friend, Mr. William H. Maloney of Washington, D.C., who specializes in income tax matters. He came to Chicago and testified on behalf of the defendant (App. 61). He was shown defendant's Exhibits 18 to 21, inclusive, for identification, which were letters sent to him by the Internal Revenue Service agents. At this point, on objection by the Gov-

ernment, the court sustained the objection to any testimony or to their introduction. This correspondence of the parties during the period between February 1963 and June 1964 should have been allowed into evidence. Its introduction certainly would have clarified the issues so that the jury would have been informed of what exactly took place between the parties. The two letters especially show that the Government agents made no claim up until the dates shown on the letters that Bakes' 1957 and 1959 returns were not on file. In the latter part of 1963 was the first time Bakes was notified that the 1957 and 1959 returns could not be found. It seems odd that the Internal Revenue Service should wait for several years before making any attempt whatsoever to locate the returns and/or to notify the defendant.

On the basis of this testimony and the direct and positive testimony of Ned C. and Rose Bakes that they mailed their returns, the District Court should have directed a verdict, as a matter of law, at the close of the evidence, rather than allow the jury to decide the question of willfullness as a matter of fact.

In *Spies* v. *United States*, 317 U.S. 492, 87 L.Ed. 418, the court said:

> "The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. Both must be willful, and willful, as we have said, is a word of many meanings, its construction often being influenced by its context. *United States* v. *Murdock*, 290 U.S. 389, 78 L. ed. 381, 54 S.Ct. 223. It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from

> accidental omission to make a timely return might meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no willful failure to disclose the liability, is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer."

In *United States* v. *Cirillo*, 251 F.2d 638, the ccurt sustained the conviction of Cirillo for failing to file income tax returns for 1953 and 1954. The questions raised on appeal from the District Court judgment were inadequate proof of willfulness which is an essential element of criminal failure to file income tax returns and instruction defining wilfullness as a deliberate intent, an evil motive and a bad purpose. The court, in sustaining the verdict of guilty, said that the jury was entitled to reason that a member of the bar has some general understanding that requires persons who earn substantial income to file periodic income tax returns. And, apart from that inference, the jury was entitled to view W-2 Forms as reminders of the duty to file received shortly before or during the period within which filing was required. Cirillo conceded that he had not filed and did not deny this from the witness stand.

As the Court said at page 639:

> "The Government's evidence, submitted to the jury without refutation or rebuttal, was sufficient to justify a conviction."

In the instant case, both the defendant and his wife testified — the defendant-appellant as to having mailed the 1957 return and Mrs. Bakes, as to having mailed the 1959 return (App. 63-69, 70-92).

In *United States* v. *Palermo*, 250 F.2d 872, the Court in testing the purpose and willful conduct of Palermo, among other things, said at page 878:

> "But in view of our traditional aversion to imprisonment for debt, we would not, without the clearest manifestation of Congressional intent, assume that mere knowing and intentional default in a payment of a tax, where there has been no willful failure to disclose the liability, is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer".

At page 881, the Court said:

> "It cannot be gainsaid that the defendant here was considerably less than a 'model' taxpayer but something more than that is requisite to establish criminal 'willful conduct'.
>
> "It is well settled that . . . the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the Federal courts."

(*Ballenbach* v. *United States*, 1946, 326 U.S. 607, 614, 66 S.Ct. 402, 406, 90 L.Ed. 350; *Wilson* v. *United States*, 9 Cir. 1958, 250 F.2d 312, pp. 324, 325).

The fact that Bakes was always delinquent cannot be denied, but he is not being tried for being delinquent in his payments, but for willful neglect to file and this he has denied, and supports that denial with testimony of the highest value, direct and positive.

The Government witnesses all testified that Bakes was delinquent; hard to interview, and difficult to see; that their efforts to contact Mr. Bakes were frustrating. No doubt this testimony did have some prejudicial influence with both the trial judge and the jury but it did not prove willfulness; it proved the reverse.

The defendant consistently filed his income tax returns and consistently failed to send in the full payment in all the years from 1955 to 1962 but does show consistent installment payment. This pattern of behavior would certainly overcome any willful failure to file for 1957 and 1959. Surely, the defendant had nothing to gain by failing to file; he again would owe the balance due and again the tax collectors would not cease in their demands upon him or upon his clients.

In *United States* v. *Long,* 3 Cir. 1958, 257 F. 2d 340, 341-342, the court held that it was reversible error to permit proof of non-filing of an income tax return in one year to evidence willfulness in a prosecution in another period.

In *United States* v. *Jannuzzio,* 184 F. Supp. 460, the court cites *United States* v. *Cirillo,* 251 F. 2d 638; *United States* v. *Palermo,* 250 F. 2d 872; and *Yarborough* v. *United States,* 230 F. 2d 56, 61, and

At page 469, the Court sets out an instruction, as follows:

> "I instruct you that the only bad purpose or bad motive, which it is necessary for the Government to prove in this case is the deliberate intention not to file returns which the defendant knew ought to have been filed, so that the Government would not know the extent of the liability."

At page 472, the Court makes a significant observation:

> "It is of little moment, that the defendants were considerably less than model taxpayers, but to warrant imposition of the heaviest penalties assessable for non-compliance with the revenue laws, more is required than that produced by the Government."

The evidence introduced by the Government was circumstantial.

In *Ribaste* v. *United States,* 44 F.2d 21, the defendant was tried and convicted of violation of the National Prohibition Act. After the Government rested its case the defendant moved for acquittal; in reviewing the evidence the Court, at page 22, said:

> "It will be thus seen, that it is conceded by counsel for the Government, that the evidence against Ribaste was wholly 'circumstantial.' The facts and circumstances proved and relied upon by the Government to sustain Ribaste's conviction must therefore not only be consistent with his guilt but must be inconsistent with his innocence; *Union Pacific Coal Co.* v. *United States,* (C.C.A.) 173 F. 737; *Edwards* v. *United States,* 7 F. 2d 357; *Salinger* v. *United States,* 23 F. 2d 48; *Spalitto* v. *United States,* 39 F. 2d 782, *Grontello* v. *U. S.,* 3 F. 2d 117."

So far as counsel for Petitioner can ascertain, this is the first time that the question involved in the instant case has been before this Honorable Court on certiorari.

CONCLUSION.

Wherefore, petitioner prays that this Court allow this Petition for Certiorari and grant the Writ of Certiorari to the Circuit Court of Appeals, Seventh Circuit.

Respectfully submitted,

JOSEPH I. BULGER
Attorney for Petitioner

APPENDIX

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1965—SEPTEMBER SESSION, 1965

No. 15109

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
NED C. BAKES,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

DECEMBER 21, 1965

Before HASTINGS, *Chief Judge,* and CASTLE and KILEY, *Circuit Judges.*

HASTINGS, *Chief Judge.* Appellant, Ned C. Bakes, was found guilty by a jury after a trial on a two-count information charging him with violations of § 7203 of the Internal Revenue Code of 1954 through willful and knowing failure to file income tax returns for the years 1957 and 1959. The trial court fined Bakes $2500 and costs and sentenced him to one year imprisonment on each of the two counts, the sentences to run consecutively.

On appeal, Bakes claims Government failed to prove beyond a reasonable doubt that he willfully and knowingly failed to file income tax returns for 1957 and 1959.

At the trial, Government offered evidence tending to show that in 1957 Bakes received gross income in the sum of $30,748.20 and in 1959 gross income of $41,794.88.

Government witnesses testified that careful and exhaustive searches, which took into account possible erroneous indexing, were made of the records of the Internal Revenue Service for Bakes' 1957 and 1959 income tax returns and that there was no record either return had been filed.

Bakes and his wife, however, testified that returns for both 1957 and 1959 had been mailed to the District Director's office.

Lawrence Pawley, special agent for the Internal Revenue Service, testified he had informed Bakes on February 27, 1963 that the returns could not be found.

Government introduced exhibits, Government's group exhibit 16, allegedly copies of Bakes' 1957 and 1959 returns, which it received from Bakes' Washington attorney, Walter H. Maloney, in January, 1964. These returns were stated by Bakes to be photostatic copies of retained copies of his 1957 and 1959 returns which he had made and sent to Maloney in the latter part of 1963.

Bakes introduced exhibits, numbered 16 and 25, which were purported retained copies of his 1957 and 1959 tax returns. Defendant's exhibit 16, a purported copy of Bakes' 1957 return, was unlike the return in Government's exhibit 16 of which it was supposedly a photostatic copy, the former being typewritten and the latter handwritten. A Government expert on questioned documents testified that defendant's exhibit 25, the purported retained copy of the 1959 return, was not a carbon copy, but was an original document.

Bakes attempted to explain these discrepancies by stating that his exhibits 16 and 25 were original copies of his returns, while the copies he sent to Maloney were merely copies of the retained original copies. The figures and

computations contained in the Maloney copy of the 1957 return, however, did not correspond with the figures and computations in the purported original retained copy. In the Maloney copy, an income figure of $14,500, which Government showed had been a portion of Bakes' 1957 income, was absent, a $3,800 figure appearing instead. Defendant's exhibit of the 1957 return, which was introduced into evidence after Government's proof of the $14,500 figure, however, did contain the $14,500 figure, instead of the $3,800 figure, which should have appeared if the Maloney copy was a true copy of the alleged original retained copy of the 1957 return.

There was other evidence which tended to show that for the years in which Bakes allegedly failed to file returns, his income was substantially greater than for the years in which he did file; that Bakes had a history of income tax payment delinquency; that Government had to garnishee Bakes' salary in order to collect his tax delinquencies; and that Bakes had attempted to avoid confrontations with agents of the Internal Revenue Service.

When the sufficiency of the evidence is challenged, the only function of this court is to determine whether the evidence was of such a character as to require submission to the jury, or whether the trial court should, instead have directed a verdict of not guilty. *United States* v. *National City Lines,* 7 Cir., 186 F. 2d 562, 569 (1951).

This court may not attempt to determine the credibility of witnesses who were heard and observed by the trial judge and jury, but must view the evidence in the light most favorable to the Government and sustain a jury verdict if there is substantial evidence to support it. *Glasser* v. *United States,* 315 U.S. 60, 80 (1942); *United States* v. *Crumble,* 7 Cir., 331 F. 2d 228, 230 (1964); *United States* v. *Zimmerman,* 7 Cir., 326 F. 2d 1, 3 (1963).

A careful review of the record, in light of the foregoing, convincingly shows that the district court did not err in allowing the jury to determine whether Bakes willfully and knowingly failed to file income tax returns for the years 1957 and 1959. The jury verdict is supported by substantial evidence.

In his brief on appeal, Bakes makes passing reference to an issue of prejudicial publicity. While not urged in oral argument, we find there are no grounds for reversal predicated on that issue.

In the summary of his argument in his brief, on appeal, Bakes claims that the trial court improperly overruled his objections to Government's evidence and improperly sustained Government's objections to his evidence. Bakes does not support his claims, and we find no merit in them.

Holding that the jury was warranted, by its general verdict of guilty, in finding that Bakes willfully failed to file his 1957 and 1959 income tax returns, and further holding that no prejudicial error was committed by the district court in the trial of this case, the judgment appealed from is affirmed.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.